IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.155 OF 2006
WITH
CIVIL APPLICATION NO.208 OF 2006

Mr.Suhem Ahmed Nomani & Anr. ..Appellants.

V/s.

Union of India. ..Respondent.

Mr.Subhash Jha i/b M/s.Law Global for appellants.

CORAM: A.M.KHANWILKAR,J

DATE : MARCH 22, 2006.

P.C. :

1. Heard counsel for the parties. Perused the relevant material on record.

2. Admit.

3. As short question is involved, appeal is taken up for final disposal forthwith by consent.

4. This Appeal from Order takes exception to the Judgment and Order passed by the City Civil Court, Bombay dated 16th January, 2006, in Notice of Motion No.2507 of 2005 in S.C.Suit No.4606 of 2003. The Appellants have filed said suit for relief of declaration and injunction. During the pendency of

the suit, the appellants took out Notice of Motion No.3678 of 2003 for temporary injunction. The court considered the said Motion at interim stage. The court, after considering rival submission, by order dated 22nd August, 2003 restrained the defendants from demolishing the plaintiffs' structure falling beyond 3944 sq.yards on survey No.196(part) except by due process of law. That order was operating in favour of the appellants till the said motion came to be dismissed for default on 11th June, 2005. The appellant immediately thereafter, took out Notice of Motion No.2507 of 2005 for recalling the said order dated 11th June, 2005. However, this Notice of Motion has been dismissed on 16th January, 2006, which order is subject matter of the present appeal. The sole reason recorded by the trial Judge, as can be discerned from the order is that the suit is pending since 2003 and having regard to the nature of the suit; coupled with the fact that the appellant has not taken steps for service of summons in the suit on the defendants, Notice of Motion deserved to be rejected.

5. After considering rival submissions and going through the record, I find substance in the argument canvassed on behalf of the appellants that the fact

recorded by the trial Judge in order dated 16th January, 2006 that the appellants had failed to take steps to serve summons of the suit on the defendants is incorrect. For, the appellants have taken steps to serve the defendants in the suit as back as in July, 2005, which is supported by documents produced before me. Only other reason which weighed with the trial Judge-having regard to the nature of the suit and it is pending from 2003-that alone cannot be the basis to consider the prayer for recalling the order, dismissing the Notice of Motion for default. The trial Judge was required to enquire as to whether there was sufficient cause made out by the appellants/- plaintiffs. That enquiry has not been done at all by the trial court. Be that as it may, from the material on record, it does appear that the appellants were under mistaken belief that Notice of Motion was adjourned to September, 2005 and for which reason did not appear before the court on 11th June, 2005 nor their advocate appeared as he was out of station.

5A. Accordingly, the impugned order deserves to be set aside and instead the Notice of Motion No.2507 of 2005 is made absolute thereby recalling the order passed by the trial Judge in Notice of Motion No.

3678 of 2003 dismissing the same for default vide order dated 11th June, 2005. Instead the Notice Of Motion No.3678 of 2003 is restored to the file to be heard on merits in accordance with the law. Interim protection, which were granted to the appellants by order dated 22nd August, 2003 will continue till disposal of the said Notice of Motion.

6. It is made clear that it will be open to the trial Judge to expedite the hearing of the suit as is observed in the impugned order dated 16th June, 2006. The trial Judge may proceed to dispose of the suit finally preferable by December, 2006. Counsel appearing for the parties assure that necessary cooperation will be extended to the trial Judge for disposal of the suit. That assurance is accepted.

7. Appeal as well as civil application disposed of accordingly.